Supreme Court, U.S.
FILED

97 917 NOV 26 1997

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No.

In The

Supreme Court of the United States

October Term 1997

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., ET AL.,

Petitioner,

v.

NATIONWIDE POWER CORPORATION ET AL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Highlander International Corp., a New Jersey corporation, f/k/a Magnacard, Inc., Petition for a Writ of Certiorari

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78 pp

QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CONTRACTUAL LIENHOLDER ENTITLED TO PRIORITY UNDER THE FEDERAL COMMON-LAW RULE THAT "THE FIRST IN TIME IS THE FIRST IN RIGHT" LOSES SUCH PRIORITY UNDER THE TERMS OF THE FEDERAL TAX LIEN ACT OF 1966.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CONTRACTUAL LIEN WHICH WAS NOT PERFECTED UNDER STATE LAW MAY BENEFIT FROM THE PROVISIONS OF THE FEDERAL TAX LIEN ACT OF 1966.

LIST OF PARTIES TO THE PROCEEDING CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1, the following is an alphabetical list of the persons, firms, partnerships and corporations with any known interest in the outcome of this appeal; deleted from this list are those parties who formerly had an interest in the case but who no longer have any interest whatsoever in its outcome:

1. Highlander International Corp., a New Jersey corporation, f/k/a Magnacard, Inc.

2. Nationwide Power Corporation, a Florida corporation.

3. United States of America.

4. Worldwide Collections Fund, Inc.

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eleventh Circuit is set forth in Appendix A. The opinion of the United States District Court for the Middle District of Florida is set forth in Appendix B. The order by the Eleventh Circuit denying the Motion for Rehearing is set forth in Exhibit C.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. §1254(1), which provides that cases in the Courts of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to a civil case. Pursuant to Rule 10(c) of the Supreme Court Rules, Petitioner submits that a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Pursuant to Rule 10(a) of the Supreme Court Rules, Petitioner submits that a Court of Appeals has decided an important question of federal law in a way that conflicts with a decision of a state court of last resort.

STATUTES INVOLVED

The pertinent provision of the Internal Revenue Code (26 U.S.C.) are set forth below:

SECTION 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SECTION 6322. Period of lien.
... the lien imposed by section 6321 shall arise at the time the assessment is made ...

SECTION 6323. Validity against mortgagees, pledgees, purchasers and judgment creditors (before amendment in 1966).
(a) ... the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary ...

SECTION 6323. Validity and priority against certain persons.
(a) The lien imposed by section 6321 shall not be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.
...
(h)(1) The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such

time the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

STATEMENT OF THE CASE

Petitioner (Magna Card, Inc., d\b\a Highlander International Corp.) holds a lien which arose via a security agreement on April 16, 1986 with Nationwide Power Corporation. Petitioner's lien was choate at that time. The tax lien arose via an assessment of a tax penalty on June 9, 1986 against Nationwide. Thus, the private lien was "the first in time."

The Notice of Federal Tax Lien ("NFTL") was filed on the public records on July 3, 1986. The contractual lien was perfected under state law via the filing of a UCC-1 in September, 1989. Thus the NFTL was properly recorded before the contractual lien was perfected under state law.

The property subject to Petitioner's lien was certain "cash collateral," an intangible. Litton Industries, Inc. wrongfully appropriated such 'cash collateral" to its own uses, so Nationwide sued Litton and received a judgment against Litton. Litton was not sure who to pay, so it filed an interpleader action in the District Court for the Eastern District of Michigan, depositing the funds needed to satisfy the judgment ($572,627.46) into the court registry. A lien priority contest ensued between Petitioner and

the United States, with both sides claiming more than the amount in the court registry.

The case was later moved to the District Court for the Middle District of Florida, Tampa Division. The United States filed a motion for summary judgment, which motion was granted on the grounds that the failure of Petitioner to perfect its lien under Florida law (i.e., file a UCC-1) before the Notice of Federal Tax Lien was properly recorded gave the tax lien priority. The Eleventh Circuit Court of Appeals affirmed and this Petition resulted.

BASIS OF FEDERAL JURISDICTION OF THE DISTRICT COURT.

The District Court for the Eastern District of Michigan had jurisdiction in the first instance over Litton's interpleader action under 28 U.S.C. §1335 in that the money deposited into the registry of the court exceeded $500.00 and two or more adverse claimants, of diverse citizenship as defined in §1332 of Title 28, as well as the United States, claimed entitlement to the money. Further, the United States has waived its sovereign immunity in 28 U.S.C. §2410 for interpleader actions involving real or personal property on which the United States has or claims a lien.

ARGUMENT

I.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CONTRACTUAL LIENHOLDER ENTITLED TO PRIORITY UNDER THE FEDERAL COMMON-LAW RULE THAT "THE FIRST IN TIME IS THE FIRST IN RIGHT" LOSES SUCH PRIORITY UNDER THE TERMS OF THE FEDERAL TAX LIEN ACT OF 1966.

The Petition for Writ of Certiorari should be granted because the Eleventh Circuit Court of Appeals decided an important question of federal law in a way which conflicts with relevant decisions of this Court and a relevant decision of the Eighth Circuit.

This is a lien priority case between a federal tax lien and a prior contractual lien which was choate (discussed below), but which was not recorded on the public records, and hence was not perfected under state law. Petitioner argued that it was entitled to priority under both the federal common law of tax lien priority and the Federal Tax Lien Act of 1966 (hereafter, the "FTLA"). The Eleventh Circuit held that the outcome was governed exclusively by the FTLA and that Petitioner's lien was not entitled to priority under the FTLA because it was not perfected under state law.

The instant question of federal law is whether Petitioner is entitled to priority under the federal common law notwithstanding the FTLA. The second question in this Petition addresses the question of whether Petitioner is entitled to priority under the FTLA.

The instant question is important for two reasons:

> **(I) Priority conflicts between contractual liens which were not perfected under state law and later arising tax liens occur with alarming frequency. A simple example makes the point intuitively. Suppose a lender loans money to the taxpayer, taking a note and mortgage on Blackacre in return, but either fails to record the mortgage on the public records or records the mortgage in the wrong county.**
>
> **(II) The interaction of the federal common law and the FTLA is fundamental to administration of the Internal Revenue laws. Obviously, important property rights are at issue, the significance of which is enhanced by the fact that the private interest holder is not the delinquent taxpayer.**

Lien priority between a federal tax lien and another lien is purely a matter of federal law.[1] Under the federal common law of priority regarding federal tax liens, the basic rule is that "the first in time is the first in right"[2], but the contractual lien is not considered effective for such purpose until it is "choate." A lien is choate when (i) the identity of the lender, (ii) the amount of the debt and (iii) the property subject to the lien are established.[3] Choateness is often referred to as

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[1] ***Aquilino v. U.S.*, 363 U.S. 509, 513 (1960).**

[2] ***Rankin & Schatzell v. Scott*, 12 Wheat (25 U.S.) 177, 179 (1827).**

"perfection in the federal sense."[4] These conditions have been met in the instant case and are not at issue.

State law concepts of perfection of contractual liens generally involve constructive notice to persons asserting later claims on the property subject to the lien. An important distinction between the federal common law concepts of perfection and state law concepts of perfection is that the federal common law looks solely to what the taxpayer may have (i.e., the IRS can only collect what the taxpayer has retained), whereas state law concepts of perfection compare the claims of competing creditors of the taxpayer to see which should prevail.

It should be noted that the federal common law of tax lien priority was developed long before state concepts of lien perfection came into existence. The lack of reference to state law concepts of perfection in any of this Court's statements of the federal common law is obvious. Accordingly, state law perfection has never been a factor in determining whether a contractual lien is superior to later arising tax liens under the federal common law as set forth by this Court.

The Eighth Circuit agreed with that analysis in its 1961 opinion in *Gauvey v. U.S.*[5] (discussed as to a related

[3] *U.S. v. McDermott*, 507 U.S. 447 (1993).

[4] E.g., *Id.* at 449.

[5] 291 F.2d 42 (8th Cir., 1961). Footnote 6 of the *Gauvey* opinion quoted from the dissent by Mr. Justice Whittaker in *United States v. R. B. Ball Construction Co.*, 355 U.S. 587, as follows: "Neither does the fact that the instrument was not recorded under the state's fraudulent conveyance

issue hereinafter.) The Seventh Circuit, however, rendered a contrary holding in *U.S. v. Trigg*[6], wherein the court stated that:

> "At the time the United States assessed the contractor's tax liability the bank's security interest was not specific and perfected in the federal sense because filing was required to protect the security interest against third party creditors." [at 1269]

By bringing state law concepts of perfection into the federal common law, the *Trigg* opinion is a significant departure from the federal common law as described by this Court.[7] As argued in the footnote below, the *Trigg* opinion is highly suspect in that regard.

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statutes— thus to impart constructive notice to subsequent purchasers, mortgagees and the like— make any difference here, for the instrument was valid between the parties to it, and Congress, by section [6323] expressly subordinated federal tax liens to antecedent mortgages," noting that the quoted statement "is not at variance with any expressed statements of the majority."

[6] 465 F. 2d 1264 (7th Cir., 1972).

[7] The Seventh Circuit cited its own pre-FTLA decision in *U.S. v. Crest Finance Co.*, 302 F.2d 568, 569 (7th Cir., 1962) in support of such holding. *Crest* was in turn based on this Court's pre-FTLA's decision in *R.B. Ball Construction Co. v. U.S.* 355 U.S. 587 (1958). However, neither of those cited cases support the conclusion. Both *Crest* and *Ball* involved liens which were inchoate because the amount was contingent. The misreading of *Ball* seems to stem from this Court's unfortunate use of the phrase "in-

Accordingly, it is clear that Petitioner's lien is entitled to priority unless there is a contrary statute.

Under sections 6321 and 6322,[8] assessment of a tax generates a lien on all of the taxpayer's assets. Since the tax lien is "secret" until notice thereof is placed on the public records, and since the federal common law dictates that "the first in time is the first in right," in the absence of statutory relief there were significant risks of grossly inequitable and commercially inefficient results. For example, in the 1893 case of *U.S. v. Snyder*,[9] this Court held that a "secret" federal tax lien prevailed over a bank's later mortgage even though such mortgage was properly recorded on the public records before the bank had actual or constructive knowledge of the tax lien.

In response Congress passed the predecessor to the FTLA, which ultimately became section 6323 of the Internal Revenue Code of 1954, and which, before its amendment in 1966, read in pertinent part as follows:

> (a) ... the lien imposed by section 6321 shall not be valid as against any mortgagee,

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choate and unperfected" in its very short opinion. Besides being contingent in amount, the lien involved in *Ball* was not perfected under state law. The Seventh circuit seems to have confused the vastly different meanings of the word "unperfected" for federal and state law purposes.

[8] All section references are to the Internal Revenue Code, unless otherwise provided.

[9] 149 U.S. 210 (1893).

> pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary ...

A straightforward reading of the statute provides that with respect to the enumerated persons, the effect of the statute is to delay the effective date of the tax lien for purposes of the first in time rule, thus protecting the enumerated classes from the "secret" tax liens which arise upon assessment. The statute did not otherwise affect the common law. That is, the statute did not affect the choateness rule of the common law, nor did it address the instant question of whether a contractual lien which was not perfected under state law could nevertheless be entitled to priority over a later federal tax lien.

Indeed, the Eighth Circuit in its decision in *Gauvey*[10] ruled as much. The Eighth Circuit held that a contractual lien which was not perfected under state law was choate and entitled to protection under the statute. The order of the relevant events in the *Gauvey* case was the same as in the instant case. The contractual lien arose first, followed by the tax assessment, the NFTL recordation and the perfection of the contractual lien under state law.[11]

While the Gauvey holding decision was correct, the Eighth Circuit made an analytical mistake. Consider the following passage from the *Gauvey* opinion:

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[10] *Gauvey, note 5.*

[11] The later perfection of the contractual lien under state law is not material.

> **Being mindful that the Supreme Court has adhered to the principle that the statute is not to be extended to afford protection to holders of inchoate and unperfected liens, we are nevertheless satisfied that the [contractual lien] does not fall within that category. The [contractual] lien ... came into existence upon execution of the contract—it was no less choate than the companion chattel mortgage which the trial court ruled was entitled to priority over the Government's lien. As to the fact that the contract was not recorded until after notice of the Government's lien was filed, we are full agreement with the trial court's ruling upon this point... While there appears to be a division in the courts on this question, we observe that the factor of recording is not mentioned in section 6323 and, in our opinion, this element should not be read into the statute as a condition precedent to the protection afforded the enumerated classes."[12]**

The analytical mistake in the *Gauvey* opinion was in applying the statute even though the contractual lien was already entitled to priority under the common law. Section 6323 provides no benefit to the contractual lienholder unless the contractual lien arises after tax assessment and before NFTL recordation. While NFTL recordation may be relevant, it is not material to the outcome where there is no relevant event between the tax assessment and the NFTL recordation. This is so because the statute does nothing but delay the effective date of the tax lien from the date of assessment to the date of

[12] ***Gauvey*, note 5, at 47.**

recording the NFTL (for purposes of the first in time rule.) Such a delay does not assist a contractual lienholder whose choate lien arose before assessment of the tax.

The FTLA was adopted in 1966. It is significant to note that the states were in the midst of adopting the Uniform Commercial Code ("UCC") at such time. The UCC, inter alia, reformed state laws concerning lien priorities.

The relevant operative language of the FTLA is contained in new subsection 6323(a), which reads in its entirety as follows:

> **"The lien provided by section 6321 shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until [the notice of federal tax lien is properly filed.]"**

Like its predecessor, the plain language of section 6323(a) does nothing more than delay the effective date of the tax lien as against the enumerated classes of creditors. In the case of contractual liens, the differences are (i) that the words "mortgagees" and "pledgees" were replaced with the phrase "holder of a security interest" and (ii) the phrase "security interest" was defined via new section 6323(h)(1), whereas the words "mortgagees" and "pledgees" were not statutorily defined.

The FTLA introduced state law concepts of perfection into the federal statutory law of tax lien priority by defining the phrase "security interest" in new section 6323(h)(1) as a contractual lien which meets a certain level of perfection under state law. The definition of a

"security interest" is discussed infra. The point here is that under the normal rules of statutory interpretation the definition is useful solely for the purpose of determining whether the contractual lienholder is enumerated in section 6323(a). The FTLA says nothing whatsoever about the question of whether a contractual lienholder is entitled to priority even though not enumerated in section 6323(a). It follows that the FTLA does not address whether a contractual lien which is not perfected under state law is entitled to priority over a later "secret" tax lien any more than its predecessor addressed such question.

Unfortunately, the Eleventh Circuit in the instant case did not address the common law and just assumed that the FTLA governs the outcome. The Eleventh Circuit held that Petitioner's lien was not a "security interest" under the FTLA. Thus Petitioner was not a "holder of a security interest" for purposes of the FTLA. Therefore, the tax lien prevailed.

As discussed above, the plain language of the FTLA provides no support for such view. Further, the legislative history provides no additional support, but merely sets forth the Congressional goal of "conforming" the IRC and UCC. In the case of contractual liens, that goal is accomplished through the definition of a "security interest," bringing state law concepts of perfection into play. It is not reasonable to infer from the legislative history that the goal of conformity requires a statutory interpretation which reverses the common law protection afforded a prior, choate lien.

Further, since the Petitioner's lien was choate and thus "perfected in the federal sense" at the time it was

granted, the effect of the Eleventh Circuit's decision was to prime a choate lien. Petitioner is not aware of any decision of any court which discusses how the FTLA could possibly be interpreted to allow a tax lien to prime a choate lien.[13]

The impact of the Eleventh Circuit opinion is to impose an additional hurdle which ALL private lienholders must overcome in order to be entitled to priority, thus converting the FTLA from a relief provision for certain private interest holders into a weapon for the IRS to use against those who do not qualify for statutory relief, but who would otherwise qualify for priority under the federal common law.

In any event, this Court has never made the mistake of ignoring the common law in a priority contest involving a federal tax lien. The following passage from this Court's 1993 *McDermott* opinion clearly shows that this Court considers the common law to govern the outcome where the choate, contractual lien arises before assessment of the tax:

> **"Federal tax liens do not automatically have priority over all other liens. *Absent provision to the contrary*, priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.' [cites omitted] ... For purposes of applying that doctrine in the present case -- in which the competing state**

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[13]Although 7th Circuit held in *U.S. v. Trigg*, note 6, at 1269, that the IRS could prime a prior lien under state law. That holding violates the principle that the reach of the federal tax lien is determined by federal law.

> lien ... benefits from the provisions of §6323(a) ... we must deem the United States' lien to have commenced no sooner than the filing of notice [instead of the time of assessment of the tax.] As for the Bank's lien: our cases deem a competing state lien to be in existence for 'first in time' purposes only when it has been 'perfected' in the sense that 'the identity of the lienor, the property subject to the lien, and the amount of the lien are established.' [i.e., were 'choate'] [cites omitted.] *The first question we must answer, then, is whether the Bank's judgment lien was perfected in this sense before the United States filed its tax lien on September 9, 1987. If so, that is the end of the matter; the Bank's lien prevails.*"[14] [italics not in original.]

Since Petitioner's lien met the choateness condition set forth in the quoted passage, it is clear that the holding of the Eleventh Circuit in this case conflicts with relevant decisions of this Court -- unless, of course, the FTLA is a "provision to the contrary." As discussed above, Petitioner asserts that none of the normal rules of statutory interpretation could lead to the conclusion that the FTLA is a "provision to the contrary" of the common law rule that a choate, contractual lien is entitled to priority over a later tax lien.

Accordingly, Petitioner's lien is entitled to priority. Certiorari should be granted so that this Court may clarify this important aspect of the federal tax law.

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[14] *McDermott*, note 3 at 449-450.

II.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CONTRACTUAL LIEN WHICH WAS NOT PERFECTED UNDER STATE LAW MAY BENEFIT FROM THE PROVISIONS OF THE FEDERAL TAX LIEN ACT OF 1966.

The petition for writ of certiorari should be granted because the Eleventh Circuit Court of Appeals decided an important question of federal law in a way which conflicts with a decision by a state court of last resort.

The second important federal question involved in this Petition is whether the holder of a contractual lien which was not perfected under state law is excluded from the list of enumerated persons entitled to the protection afforded by the FTLA.

The instant question assumes that the answer to the first question in this Petition was that the contractual lienholder was not entitled to priority unless enumerated within the protected classes described in section 6323(a). In essence, the instant issue is whether Petitioner's contractual lien is a "security interest" within the meaning of section 6323(a) even though not perfected under state law.

The phrase "security interest"is defined in section 6323(h)(1) as follows:

> **The term "security interest" means any interest in property acquired by contract for**

> the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth."

As mentioned above, the definition of "security interest" introduced state law concepts of perfection into the law of federal tax lien priority. This is accomplished by testing the contractual lien against something "under local law" to see if is firm enough to be entitled to priority over the tax lien. That process requires a lien to test the contractual lien against. Congress established a hypothetical lien for such purpose. The instant question boils down to what is meant by the phrase "judgment lien arising out of an unsecured obligation". That is, what are the characteristics of the hypothetical lien against which the contractual lien is to be tested?

In *Peninsula State Bank v. U.S.*[15] the Florida Supreme Court interpreted the phrase "judgment lien arising out of an unsecured obligation" as meaning "only a simple unperfected judgment lien."[16] Thus the Florida Supreme Court effectively interpreted the phrase as a matter of federal law to mean whatever rights the hypothetical holder would have under local law upon the recording of a simple money judgment.

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[15]211 So.2d 3 (Fla. 1968).

[16]Id., at 7.

In Florida a simple money judgment lien does not attach to intangibles. Rather, further judicial action, such as a garnishment action against a third party, is necessary in order for the judgment holder to establish a lien on an intangible. Such a garnishment lien is referred to as a "judicial lien" to distinguish it from a "judgment lien."[17]

The significance of the interpretation offered by the Florida Supreme Court in the instant case is that since the hypothetical judgment lien could not have attached to the intangible involved in this case, Petitioner's contractual lien would not be tested against a lien which had attached to the property. This means Petitioner's lien would win the priority contest under local law against the hypothetical judgment lien,[18] which in turn means Petitioner's lien met the FTLA definition of a "security interest" and hence prevailed over the tax lien even though it was not perfected under Florida law.

In the instant case, however, the Eleventh Circuit labored hard, but ultimately concluded that the phrase "judgment lien arising out of an unsecured obligation" meant the lien held by a UCC lien creditor.[19] Since the

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[17]Id. at 5.

[18]Fla. Stat. §679.312(5)(b).

[19]The crux of the 11th Circuit's reasoning was that (i) the phrase "judgment lien" has no general meaning, (ii) the "simple judgment lien" interpretation rendered by the Florida Supreme Court led to a failure of the hypothetical lien to attach to the property, thus writing the word "lien" out of the statute and (iii) Treas. Regulations

lien held by a UCC lien creditor is, by definition under state law, superior to a contractual lien which was not perfected under Florida law,[20] Petitioner's lien was not a "security interest" and Petitioner was not among the enumerated classes entitled to the benefit of the FTLA.[21]

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§301.6323(h)- 1(g) (see Exhibit D) support an interpretation where the hypothetical lien attaches to the property. Petitioner contends that opinions of this Court and said Treas. Regulation use the phrase "judgment lien" numerous times as meaning something which exists prior to becoming choate and prior to being perfected under local law. For example, the judgment lien in *McDermott* did not attach until the taxpayer acquired the property. Similarly, said Treas. Reg. refers to judgment liens which are not perfected "until" they attach. The Regulation support an interpretation of the phrase "judgment lien" as something which can be held by a person who is not a "judgment lien creditor", within the meaning of Section 6323(a).

[20]Fla. Stat. section 679.301.

[21]As to whether an unperfected lien could benefit from the pre-FTLA version of section 6323, compare, *Gauvey v. U.S.*, note 5, wherein the 7th Circuit held that recording should not be read into section 6323, with *Allan v. Diamond T. Motor Car Co.*[22], 291 F.2d 115 (10th Cir., 1961) wherein the 10th Circuit held that statutory relief was not available for an unrecorded lien. The 10th Circuit wrote: "The next question is the relative priority of the mortgage lien and the tax lien... This must be determined under the perfected lien rule, and there was no perfected lien because the mortgage was not recorded in the proper county... The purpose of section 6323 is to protect the lienors therein mentioned from a secret federal tax lien,

The Eleventh Circuit correctly observed that the interpretation of the phrase "judgment lien arising out of an unsecured obligation" is a matter of federal law. Petitioner asserts that such interpretation is an important question of federal law because, like the first issue in this Petition, it is significant to the administration of the federal tax laws. In particular, it determines the outcome of a very large set of federal tax lien priority contests, to-wit: those involving contractual liens which were not perfected under state law and which arise before the recording of the tax lien where the property subject to such lien would not be subject to a judgment lien in such state upon the recording of a simple money judgment.[23]

There are several reasons why the Eleventh Circuit should be reversed on this issue. On its face, the Eleventh Circuit's "UCC lien equivalency" interpretation is a bit startling in comparison to the straightforward "simple money judgment" interpretation offered by the Florida Supreme Court. Surely, if Congress had intended to require the contractual lien to defeat all later liens, Congress could have found a clearer way to say so. Consider, for example, the "judicial lien" language contained in 11 U.S.C. 544(a)(1). This point is amplified by the fact that Congress rejected language which would have

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not to subject a federal tax lien to a secret private lien."

[22]In comparison, the first issue in this Petition (whether the tax lien could prime a choate lien) covered all liens unperfected under state law arising before the date of tax assessment, regardless of the nature of the property involved. That is, the first issue covered only pre- assessment liens, while the second issue covers liens on certain types of property arising before the recording of the tax lien.

effectively generated the "UCC lien equivalency" holding of the Eleventh Circuit.[24]

Further, the "simple money judgment" interpretation is consistent with the views of this Court. In *Bull v. U.S.*[25] this Court analogized a tax assessment to a money judgment. Petitioner asserts that such analogy not only makes a great deal of sense in the abstract, it supplies a reasonable basis for interpreting the FTLA in accordance with its plain meaning.

Consider also that the Congressional purpose in supplying a definition of a "security interest" was to require that the contractual lien attain some level of dignity under state law before it would benefit from the FTLA provisions. It thus became necessary to test the contractual lien against some standard, which meant that it would have to be tested against another lien. But what lien should it be tested against?

At one extreme is the view that the test should be no more than the choateness standard (i.e., the IRS is limited to collecting what the taxpayer owns.) At the other extreme is the view that if the contractual lien cannot defeat all later liens, then it should not defeat the tax lien. The Eleventh Circuit effectively adopted the second line, thus giving the IRS the full benefit of the various state recording laws.[26]

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[23]This matter is discussed at length in footnote 4 of the 11th Circuit's opinion at 372.

[24]295 U.S. 247 (1935).

[25]The equities favor the contractual lienholder, who would only have an effective lien under section 6323(h)(1)(B) to

In Petitioner's view the correct interpretation of the statutory language is that it is a reasonable balancing of competing interests, i.e.,

> "... an intermediate position between [the two schools of thought] that (i) the IRS should not enjoy the protection of the recording acts and (ii) an unperfected lien was so infirm as to be inchoate."[27]

By testing the contractual lien against a simple money judgment, Congress effectively placed the IRS in the same position upon assessing a tax as a hypothetical person who records a simple money judgment. Of course, the IRS can protect itself through the simple expedient of recording the tax lien — and a lender making a loan thereafter would not have priority. But this was true under the pre-FTLA version of section 6323.

Since a UCC lien creditor is considered perfected in every jurisdiction, the Eleventh Circuit opinion has effectively eliminated local law considerations (other than those dealing with perfecting the contractual lien) from the FTLA.

While the second issue in this Petition is moot if this Court rules in favor of the Petitioner on the first issue, the second issue is nevertheless worthy of this

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the extent of the "money or money's worth" given up, which consideration presumably created another asset in the taxpayer's hands for the the IRS to reach.

[26]Plumb and Wright, Federal Tax Liens, ALI-ABA (3d edition, 1972).

Court's consideration. Accordingly, certiorari should be granted.

CONCLUSION

For the reasons stated the United States Supreme Court should grant this petition for writ of certiorari.

Respectfully submitted,
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By: _____

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Dated: November ___, 1997

EXHIBIT A

106 F.3d 366
65 USLW 2582, 79 A.F.T.R.2d 97-1356,
97-1 USTC P 50,236, 31 UCC Rep.Serv.2d 1175,
10 Fla. L. Weekly Fed. C 719
(Cite as: 106 F.3d 366)

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., Plaintiff,

v.

NATIONWIDE POWER CORPORATION; Fitzgerald, Peters, Dakmak & Miller, P.C., Defendants-Cross-Defendants,

United States of America, Defendant-Cross-Defendant-Appellee,

Magna Card, Inc., d.b.a. Highlander International Corp.; John F. Roscow, III, Defendants-Cross-Defendants-Appellants,

Brooks Satellite, f.k.a. Nationwide Power Corporation, Defendant-Cross-Defendant.

No. 95-2725.

United States Court of Appeals, Eleventh Circuit.

Feb. 24, 1997.

Judgment debtor commenced interpleader action regarding funds owed to judgment creditor. The United States District Court for the Middle District of Florida, No. 91-377-CIV-T-21C, Ralph W. Nimmons, Jr., J., entered summary judgment for government, 1995 WL 381838, and security interest holder appealed. The Court of

Appeals, Birch, Circuit Judge, held that federal tax lien had priority over unperfected security interest in funds.

Affirmed.

[1] INTERNAL REVENUE k4792
220k4792
Under Federal Tax Lien Act (FTLA), any "security interest" which arises prior to proper filing of federal tax lien takes priority over tax lien. 26 U.S.C.A. §§ 6321-6323.

[2] INTERNAL REVENUE k4786
220k4786
To qualify as "security interest" with priority over federal tax lien, interest must satisfy four conditions: security interest was acquired by contract for purpose of securing payment or performance of obligation or indemnifying against loss; property to which security interest was to attach was in existence at time tax lien was filed; security interest was, at time of tax lien filing, protected under state law against judgment lien arising out of an unsecured obligation; and holder of security interest parted with money or money's worth. 26 U.S.C.A. § 6323.

[3] STATUTES k188
361k188
In case involving statutory construction, court's starting point always is language of statute, and it assumes that Congress expressed its intent by ordinary meaning of words it used.

[3] STATUTES k212.6
361k212.6
In case involving statutory construction, court's starting point always is language of statute, and it assumes that

Congress expressed its intent by ordinary meaning of words it used.

[4] INTERNAL REVENUE k4786
220k4786
Federal law, not state law, governs priority contest between security interest and federal tax lien. 26 U.S.C.A. §§ 6321-6323.

[5] INTERNAL REVENUE k4786
220k4786
"Judgment lien" that security interest must be protected against under state law, in order to have priority over federal tax lien, is equivalent to interest of Uniform Commercial Code (UCC) lien creditor. 26 U.S.C.A. § 6323.
See publication Words and Phrases for other judicial constructions and definitions.

[6] INTERNAL REVENUE k4786
220k4786
Security interest that was unperfected under Florida law did not have priority over federal tax lien in interpleaded funds. 26 U.S.C.A. § 6323; West's F.S.A. § 679.301(1)(b).

*367 John F. Roscoe, III, Steven M. Chamberlain, Scruggs & Carmichael, P.A., Gainesville, FL, for appellants.

Gary R. Allen, Murray S. Horwitz, Tax Division, Dept. of Justice, Paula K. Speck, Loretta C. Argrett, William S. Estabrook, Dept. of Justice, Washington, DC, for appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, Circuit Judge, KRAVITCH [FN*], Senior Circuit Judge, and SCHWARZER [FN**], Senior District Judge.

FN* Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.

FN** Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

BIRCH, Circuit Judge:

The issue in this appeal is whether an unperfected security interest in interpleaded funds is entitled to priority over a competing federal tax lien. The district court held that the federal tax lien is entitled to priority. We affirm.

I. BACKGROUND

The facts in this appeal are essentially undisputed. Plaintiff Litton Industrial Automation Systems, Inc. ("Litton") filed this interpleader action in the United States District Court for the Eastern District of Michigan, from which it was transferred to the United States District Court for the Middle District of Florida. Litton deposited in the registry of the court $572,627.46, which it owed to Nationwide Power Corporation ("Nationwide") pursuant to a judgment obtained by Nationwide on August 15, 1989. The real parties in interest are Highlander International Corporation ("Highlander") and the United States. [FN1]

FN1. The district court dismissed Litton from the case as a disinterested stakeholder. The court also dismissed with prejudice all the defendants, except Highlander and the IRS. On February 23, 1995, John F. Roscow, attorney for Nationwide, Magna Card, Inc., and Highlander moved to be substituted as a party for Magna Card and Highlander. The district court denied Roscow's motion, and Roscow appeals. We summarily affirm the district court's denial of this motion.

Highlander's interest in the interpleaded funds stems from an agreement between Nationwide and Highlander, pursuant to which Nationwide sought to secure a debt it owed to Highlander. [FN2] In this agreement, Nationwide granted to Highlander a security interest in certain "cash collateral," including Nationwide's cause of action against Litton, which eventually resulted in the money judgment here in dispute. This interest arose on the date of the agreement, April 15, 1986. Highlander did not file a UCC-1 statement until August 1989, however. The Government's interest in the interpleaded funds arose from a tax assessment on June 9, 1986 of tax penalties exceeding $700,000 against Nationwide. On July 3, 1986, the Internal Revenue Service ("IRS") filed a notice of federal tax lien in Broward County, Florida, in which Nationwide had its principal executive office.

FN2. A series of commercial transactions preceded this agreement. These transactions are described in the district court's opinion. See Litton Indus. Automation Sys. v. Nationwide Power Corp., 75 A.F.T.R.2d (RIA) 2276 (M.D.Fla.1995). A detailed description of these transactions is not necessary

here because it has no bearing on the resolution of the narrow issue on appeal.

On July 27, 1989, the IRS served a notice of levy on Litton's attorney, directing him to deliver to the IRS any monies owed to Nationwide. After judgment was entered in favor of Nationwide in its suit against Litton, Litton initiated the instant interpleader action to determine which party is entitled to *368 the funds. The district court granted summary judgment to the Government, holding that the federal tax lien was entitled to priority over Highlander's security interest. This appeal followed.

II. DISCUSSION

We have jurisdiction to review the district court's order under 28 U.S.C. § 1291. Because at least two of the defendants named in this interpleader action are of diverse citizenship, the district court's jurisdiction was founded on 28 U.S.C. § 1335. The Government has waived its sovereign immunity for interpleader actions involving tax liens in 28 U.S.C. § 2410.

We review the district court's grant of summary judgment de novo and apply the same legal standards as the district court. Sultenfuss v. Snow, 35 F.3d 1494, 1499 (11th Cir.1994) (en banc), cert. denied, --- U.S. ----, 115 S.Ct. 1254, 131 L.Ed.2d 134 (1995). This case involves a pure question of law: Is Highlander the "holder of a security interest" which is entitled to priority over the Government's federal tax lien under the Federal Tax Lien Act of 1966 ("FTLA"), 26 U.S.C. § 6323?

A. Applicable Law

[1] Before we address the contentions of the parties, we briefly outline the applicable law. Under the Internal Revenue Code, a tax lien arises at the time of assessment, 26 U.S.C. § 6322, on "all property and rights of property, whether real or personal, belonging to" a delinquent taxpayer, id. § 6321. The FTLA provides, however, that the tax lien "shall not be valid as against any ... holder of a security interest ... until notice thereof which meets the requirements of subsection (f) has been filed." Id. § 6323(a). Therefore, any "security interest" which arises prior to the proper filing of a federal tax lien takes priority over the tax lien. See United States v. McDermott, 507 U.S. 447, 449, 113 S.Ct. 1526, 1528, 123 L.Ed.2d 128 (1993). The FTLA defines a "security interest" as

> any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

26 U.S.C. § 6323(h)(1). The dispute in this case is whether Highlander's interest qualifies as a security interest as defined by the FTLA.

B. District Court Opinion and Contentions of the Parties

[2] It is undisputed in this appeal that a tax lien arose upon all Nationwide's property on June 9, 1986, the first date of the tax penalty assessments against Nationwide. It is also undisputed that the IRS properly filed a notice of this tax lien in Nationwide's county of residence, as required by 26 U.S.C. § 6323(f)(2)(B), on July 3, 1986.

Therefore, for Highlander's interest to take priority over the tax lien, Highlander must have been the holder of a "security interest," as that term is defined in the FTLA, on July 3, 1986. To do so, Highlander must establish that its interest satisfies four conditions:

> (1) that the security interest was acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss; (2) that the property to which the security interest was to attach was in existence at the time the tax lien was filed; (3) that the security interest was, at the time of the tax lien filing, protected under state law against a judgment lien arising out of an unsecured obligation; and (4) that the holder of the security interest parted with money or money's worth.

Haas v. Internal Revenue Serv. (In re Haas), 31 F.3d 1081, 1085 (11th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 2578, 132 L.Ed.2d 828 (1995). As in Haas, the only issue on appeal in this case is whether the third condition is satisfied. In other words, this case turns on whether Highlander's interest was protected under Florida law--the applicable local law--against a *369 judgment lien arising out of an unsecured obligation on July 3, 1986.

Relying on the "hypothetical judgment lien creditor test" adopted by this court in Haas, the district court held that Highlander's interest was not protected under Florida law against a judgment lien.

> [T]he hypothetical judgment lien creditor test operates to put the IRS in the shoes of any subsequent judgment creditor, including the most favorable shoes. Thus, if any subsequent judgment creditor could prevail over [Highlander], then the IRS prevails.

Haas, 31 F.3d at 1089 (footnote omitted). The district court reasoned that a class of judgment creditors, those

who qualify as "lien creditors" as defined in U.C.C. § 9-301(3) and who have no notice of Highlander's previous unperfected interest, could have prevailed over Highlander's interest under Florida law. The court concluded that the Government prevails here.

Highlander contends, however, that under Florida law a "judgment lien" does not attach to intangible assets, such as the funds at issue in this case, until the judgment creditor has taken further judicial action--by way of garnishment or an independent suit to enforce the debt. See Peninsula State Bank v. United States, 211 So.2d 3, 5 (Fla.1968). Highlander concludes that the holder of a simple "judgment lien" on intangibles does not qualify as a UCC "lien creditor" under Florida law. Thus, Highlander's security interest, though unperfected, prevails over the judgment lien because Highlander's interest was the first to attach. See Fla. Stat. ch. 679.312(5)(b) (1995).

Highlander argues that Haas is distinguishable. The priority contest in Haas was between a mortgagee who had mistakenly released its mortgage on the contested real property and a federal tax lien. The applicable local law was Alabama law, which provided that the mortgagee's interest is subordinate to that of a "judgment creditor without notice." Haas, 31 F.3d at 1086. The issue decided in that case was whether knowledge on the part of the IRS of the mistakenly released mortgage affected the hypothetical priority contest--we decided that it did not--, not whether the IRS should be treated as a UCC lien creditor. In other words, the IRS would have won the priority contest in Haas, whether it was a UCC lien creditor or not, because it was the hypothetical holder of a "judgment lien" and thus a judgment creditor entitled to priority under Alabama law. Highlander acknowledges

that, in Haas, we noted: "In interpreting the phrase 'protected under local law against a subsequent judgment lien,' courts and commentators have determined the phrase is equivalent to being protected against a 'lien creditor' as defined in U.C.C. § 9-301(3)." Haas, 31 F.3d at 1087. Highlander contends, however, that this statement is dictum, in light of the discussion of the specific type of interest and applicable local law at issue in Haas.

Highlander also distinguishes Dragstrem v. Obermeyer, 549 F.2d 20 (7th Cir.1977), which is the first decision of a United States Court of Appeals to adopt the hypothetical judgment creditor test and upon which we relied heavily in Haas. Dragstrem involved facts analogous to those we face here. The priority contest in Dragstrem was between an unperfected security interest and a subsequent tax lien over an interpleaded fund. Id. at 22. The difference between Dragstrem and this case lies, however, in the applicable local law. The relevant local law in Dragstrem was U.C.C. § 9- 301(1)(b), which, as adopted in Indiana at the time, provided that "an unperfected security interest is subordinate to the rights of ... (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." Id. at 23 (omission in original) (emphasis added). The equivalent provision of Florida law is a newer version of section 9-301(1)(b) that omits the knowledge requirement. See Fla. Stat. ch. 679.301(1)(b). Therefore, the central issue decided in Haas and Dragstrem, whether knowledge on the part of the IRS affects the priority of the tax lien, is not relevant in this case.

More importantly, a judgment lien attaches to intangible property in Indiana upon docketing of a judgment and the delivery of a writ of execution to the sheriff, Dragstrem, 549 F.2d at 27, without any additional judicial

*370 proceeding as required in Florida. Highlander argues that the holder of a "simple judgment lien" is therefore a UCC lien creditor under Indiana law but not under Florida law. Compare id. ("Upon delivery [of the writ to the sheriff], the lien would attach to the debtor's property and the creditor would become a 'lien creditor' under the UCC.") with Peninsula State Bank, 211 So.2d at 5 ("The only way a simple judgment creditor can reach [intangible property] owed to his debtor is by way of a separate and independent judicial proceeding ...."). According to Highlander, that such holder of a simple judgment lien prevailed under Indiana law does not mean that it should prevail under Florida law.

The Government contends, however, that the additional procedural steps that a Florida judgment creditor must take for its judgment lien to attach to intangible property are no different from the lack of knowledge requirement that was at issue in Haas. In order to be in "the most favorable shoes," Haas, 31 F.3d at 1089, the hypothetical judgment creditor must be assumed to have completed whatever additional steps are required under local law for the judgment lien to attach. Highlander responds that there is an important distinction between the knowledge requirement in Haas and the additional steps necessary under Florida law for a judgment lien to attach to intangible property. The underpinning of the hypothetical judgment creditor test is that the FTLA

> "does not put the government in the position of a competing holder of a security interest or judgment lien, but rather describes the legal status which security interests must obtain under state law in order to have priority over later filed or unfiled federal tax liens."

Haas, 31 F.3d at 1087 (quoting Dragstrem, 549 F.2d at 26). Therefore, whether the IRS had knowledge of the

security interest is irrelevant to the inquiry of whether that security interest achieved a given legal status. Under Haas, we do not engage in "a case-by-case inquiry into whether the IRS had 'notice.' " Haas, 31 F.3d at 1088. Instead, we compare the security interest at issue to a given legal construct, namely a hypothetical "judgment lien." Just what the phrase "judgment lien" means was not an issue in Haas, although it was addressed in dicta. See id. at 1087 (noting that "courts and commentators have determined the phrase is equivalent to ... a 'lien creditor' as defined in the U.C.C. § 9-301(3)"). Highlander argues that the plain meaning of the phrase "judgment lien" is a "simple" judgment lien that arises, but not necessarily attaches to intangible property, upon the entry of a judgment. Highlander argues further that whether such "judgment lien" should be considered to have attached to the property in dispute is a matter of state law. If state law requires separate judicial action for the lien to attach to the property, then a "judgment lien" in that state, even a hypothetical judgment lien, has not attached and its holder is not a UCC lien creditor. Cf. Peninsula State Bank, 211 So.2d at 5. Highlander adds that defining a "judgment lien" in this fashion does not defeat the congressional purpose, implemented in the hypothetical judgment creditor test, of avoiding a case-by-case inquiry into whether the IRS actually complied with certain state law requirements--i.e., had no notice (as in Haas) or performed the actions necessary under state law for the judgment lien to attach to the property in question.

C. Analysis

We agree with Highlander that Haas does not necessarily dictate the result in this case. To determine whether the

language of Haas should be extended to encompass the additional steps needed under Florida law for a "simple judgment lien" to attach, we must construe the statute and ascertain what the phrase "judgment lien," as used by Congress in section 6323(h)(1), means.

[3] In a case involving statutory construction, our starting point always is the language of the statute, and we assume that Congress expressed its intent by the ordinary meaning of the words it used. American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982); Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1522 (11th Cir.1987). The FTLA does not define the phrase "judgment lien." Highlander relies primarily on the Florida Supreme *371 Court's decision in Peninsula State Bank to argue that the plain meaning of the phrase "judgment lien" is a "simple unperfected judgment lien." Peninsula State Bank, 211 So.2d at 7. The gist of this argument is that, under Florida law, a simple money judgment against a defendant creates a "lien" on all of its property. Such a lien, "a simple judgment lien" in the terminology used by the Florida Supreme Court, does not attach to the defendant's intangible personal property until further judicial action is taken. Id. at 5. Highlander's argument is unconvincing.

[4] Federal law, not state law, governs a priority contest between a security interest and a federal tax lien. Haas, 31 F.3d at 1084-85 (citing Aquilino v. United States, 363 U.S. 509, 513-15, 80 S.Ct. 1277, 1280-81, 4 L.Ed.2d 1365 (1960)). Thus, although the FTLA resolves such a contest by comparing the security interest to a judgment lien under state priority rules, what constitutes a "judgment lien" within the meaning of section 6323(h)(1) is a matter of federal law. We are concerned with what Congress

intended that phrase to mean, not with what state law labels as a judgment lien. Cf. id. at 1088 n. 10 (definition of "judgment creditor" in a predecessor to the FTLA is a matter of federal law).

[5] The phrase "judgment lien" does not have a generally understood meaning. See Texas Oil & Gas Corp. v. United States, 466 F.2d 1040, 1047 (5th Cir.1972) ("The phrase 'protected against a judgment lien' is not a term of art ...."), cert. denied, 410 U.S. 929, 93 S.Ct. 1367, 35 L.Ed.2d 591 (1973); Peter F. Coogan, The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code, 81 Harv. L. Rev. 1369, 1389 (1968) ("The term 'judgment lien' is not generally used in chattel security statutes...."). For example, in contrast to Florida, there appears to be no such thing as a "judgment lien," whether labeled "simple" or not, on personal property in some states. See, e.g., Keep Fresh Filters, Inc. v. Reguli, 888 S.W.2d 437, 443 (Tenn.Ct.App.1994) (Under Tennessee law, "judgment creditors ... may obtain two significantly different liens against the judgment debtor's property. The first is [a] judgment lien ... that attaches to ... real property. The second is [an] execution lien ... that attaches to ... personal property."); Franchise Tax Bd. v. Danning (In re Perry), 487 F.2d 84, 89 (9th Cir.1973) (Zirpoli, J., dissenting) (explaining that "no provision of California law ever permits that a judgment lien attach to personal property" and that only an "execution lien" can reach such property), cert. denied, 415 U.S. 978, 94 S.Ct. 1565, 39 L.Ed.2d 874 (1974). In other states, a simple judgment creates no lien at all on personal property, and a judgment lien does not arise until certain additional action is taken by the judgment creditor. See, e.g., Fore v. United States, 339 F.2d 70, 72 (5th Cir.1964) (Under Texas law, "[t]he filing and

indexing of [a] judgment in ... Harrison County entitled [the judgment creditor] to a lien upon all of the real estate of the defendant ... situated in the county. It gave him no lien on the personal property of the defendant."); First Security Bank v. Friese Mfg., Inc., 489 N.W.2d 342, 345 (N.D.1992) ("Under North Dakota law, a judgment lien on personal property only arises upon the 'actual levy' of the property in question."). [FN3]

> **FN3. The inconsistency between what these courts from other states refer to as a judgment lien or execution lien and what the Florida Supreme Court refers to as a "simple judgment lien" in Peninsula State Bank appears to stem from a different understanding of the word "lien." For the Reguli, Fore, and First Security Bank courts, and the dissenting judge in Perry, a lien is an interest that has actually attached to the defendant's property. The Florida court uses the word "lien" to mean a claim arising from a judgment but that has not necessarily attached to the subject property. This inconsistency may be a good example of what Massachusetts Justice H.T. Lummus said: "The word 'lien' hardly admits of definition. It is used to describe various kinds of interests in property or rights over it, and is frequently used in a very loose way." H.T. Lummus, The Law of Liens with Especial Reference to Massachusetts & Maine I (1904), quoted in Coogan, supra, at 1371 n. 11. Unfortunately, Congress did not define the word "lien" or the phrase "judgment lien" in the FTLA.**

Even the Florida Supreme Court's opinion upon which Highlander relies is confusing in defining a judgment lien. Although the court eventually concluded in that opinion

*372 that the term "judgment lien" used in 26 U.S.C. § 6323(c)(1)(B) means a "simple judgment lien" under Florida law, it also stated: "[I]nsofar as what we call a 'simple judgment creditor' is concerned, there simply is no such thing as a judgment lien against [intangible property] in this state." Peninsula State Bank, 211 So.2d at 5 (emphasis added). What the court was referring to in its opinion as a "simple judgment lien" is therefore nothing more than a simple money judgment. This interpretation of the phrase "judgment lien," which Highlander invites us to adopt, in fact reads the word "lien" out of the statute. As the Eighth Circuit did in a similar case, we decline this invitation. See International Fidelity Ins. Co. v. United States, 949 F.2d 1042, 1045 (8th Cir.1991).

We conclude that the phrase "judgment lien" has no ordinary meaning so as to compel Highlander's interpretation of the phrase within the context of the FTLA. The Government argues that "judgment lien," as used in the FTLA, is equivalent to the interest of a UCC lien creditor. This interpretation is one that has been adopted almost unanimously by the commentators, see, e.g, Timothy R. Zinnecker, When Worlds Collide: Resolving Priority Disputes Between the IRS and the Article Nine Secured Creditor, 63 Tenn. L. Rev. 585, 605-06 & nn.89-90 (1996) (collecting cases); Coogan, supra, at 1382-83, and by the courts--though arguably in dicta, see, e.g., Haas, 31 F.3d at 1087; Dragstrem, 549 F.2d at 25. The rationale for adopting this interpretation is that one of Congress's main goals in enacting the FTLA was "to conform the lien provisions of the internal revenue laws to the concepts developed in [the] Uniform Commercial Code." H.R.Rep. No. 89-1884, at 1-2 (1966), reprinted in Committee on Ways and Means, 89th Cong., Legislative History of H.R. 11256: Federal Tax Lien Act of 1966, at

443-44 (1966) [hereinafter Legislative History]. The only way in which the UCC gives effect to the interest of a judgment creditor is the "lien creditor" concept embodied in section 9-301(3) of the UCC. See Coogan, supra, at 1382-83. The logical conclusion, though by no means an inevitable one, is that Congress intended the phrase "judgment lien" to mean the interest, arising from a judgment (as opposed to assignment, for example), that a lien creditor has in a given property. [FN4] This conclusion is further supported by the fact that it gives effect to Congress's "specific legislative intent ... to enable creditors to protect certain types of security interests against subsequent federal tax liens, and to do so by taking the same steps already necessary under state law to protect their interests against various other types of competing claims." [FN5] Dragstrem, 549 F.2d at 26.

FN4. Highlander's strongest attack on this conclusion is that a previous version of the bill that eventually became the FTLA defined "security interest" in terms equivalent to those used in the UCC, but that this language was deleted from the bill. Compare 26 U.S.C. § 6323(h)(1) (enacted definition of security interest) with H.R. 11256, 89th Cong. § 101 (1966) (version initially introduced by Rep. Mills) (providing in 26 U.S.C. § 6323(h)(4) that "[a] security interest shall be deemed to arise at the time when it becomes protected under local law as against a subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract"), reprinted in Legislative History, supra, at 50. Highlander infers that Congress must have intended to develop the law in a way that is inconsistent with the UCC lien creditor analysis. Congress, however,

could have modified the language for other reasons. According to Coogan, "[a]pparently, in an effort to conform the language of other parts of section 6323 to that of subsection (a), where 'judgment lien creditor' is not inappropriate, the language was changed by Treasury draftsmen who understandably knew more tax law than lien law." Coogan, supra, at 1389. Moreover, that the drafters of the statute substituted ambiguous language for more accurate language in a previous version of the bill does not inevitably lead to the conclusion that Congress rejected the analysis consistent with the more accurate language. Congress might have failed to realize that the new language is ambiguous and might have intended no change in the substantive provision. In short, while the change in statutory language casts some doubt on the Government's interpretation, it is not dispositive of the issue in this case, at least in light of the total absence of any explanation of the change in the voluminous legislative history of the FTLA.

FN5. When the security interest covers personal property, as it does here, the steps already necessary under state law to protect the interest from other types of competing claims include perfecting the security interest by filing a UCC-1 statement or other means.

In short, we are faced with two possible interpretations of an ambiguous phrase that *373 Congress used in the FTLA. Cf. Texas Oil & Gas Corp., 466 F.2d at 1047 ("The phrase 'protected against a judgment lien' is not a term of art easily adaptable to the sometimes equally unartful language of the Uniform Commercial Code.");

David G. Epstein & Steve H. Nickles, Debt: Bankruptcy, Article 9 and Related Laws, 521 n.56 (1994) (stating that "[t]he use of the term 'judgment lien' was unfortunate") quoted in Zinnecker, supra, at 606 n. 90; Coogan, supra, at 1388 (characterizing the phrase "judgment lien" as "baffling language"). Although we believe that the interpretation offered by the Government is the better one, [FN6] we need not resolve this case solely on the basis of the statutory analysis described above. Congress has entrusted the administration of the Internal Revenue Code, which includes the FTLA, to the United States Department of Treasury and the IRS. In construing an administrative (or regulatory) statute, we are guided by the framework of analysis set out by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. at 2781. If Congress did not express its intent unambiguously, we defer to the agency's interpretation if it "is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. at 2782.

> **FN6. We reach this conclusion because the Government's interpretation is logical and comports with the stated purpose of the statute, while Highlander's interpretation is unconvincing. As presented by Highlander, the meaning of the phrase "judgment lien" in section 6323(h)(1) is derived from what the Supreme Court of Florida labels as a judgment lien. Accepting Highlander's interpretation leads to two equally unlikely results: First,**

> Congress could have chosen Florida's interpretation as the federal standard, a result that has no support whatsoever in the statute or elsewhere. Moreover, as we already discussed, this result essentially reduces the phrase "judgment lien" to "simple judgment," thus reading the word "lien" out of the statute. Second, Congress could have intended for the meaning of the phrase to be governed by each state's understanding of what a judgment lien is, a result that defeats the FTLA's purpose of uniformity. Cf. United States v. Gilbert Assocs., 345 U.S. 361, 364, 73 S.Ct. 701, 703, 97 L.Ed. 1071 (1953) (stating, in the context of a predecessor to the FTLA, "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' should have the same application in all the states.").

As we have already stated, we believe that Congress did not express its intent unambiguously when it used the phrase "judgment lien" in section 6323(h)(1). Department of Treasury regulations, however, define "judgment lien" as "a lien held by a judgment lien creditor." Treas. Reg. § 301.6323(h)-1(a)(2).

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved.... If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected ... until

> the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved.

Treas. Reg. § 301.6323(h)-1(g). In short, the regulation codifies the interpretation of "judgment lien" that the Government advocates in this case and that we have already determined is not only permissible, but also is the better interpretation. This interpretation holds that a judgment lien is equivalent to the interest of a UCC lien creditor. Under the second step of Chevron, we must defer to the Department's interpretation.

[6] Because Highlander's interest in the interpleaded funds was unperfected under Florida law on July 3, 1986, it was subordinate *374 to that of a UCC lien creditor. See Fl. Stat. ch. 679.301(1)(b). Highlander's interest, therefore, was not protected under local law against a judgment lien arising on that date; it was not a "security interest" within the meaning of 26 U.S.C. § 6323(h)(1). The Government's tax lien is entitled to priority.

III. CONCLUSION

This appeal involves a priority contest between an unperfected security interest and a federal tax lien. The district court held that the tax lien takes priority. The case turns on whether the security interest is protected under local law against a "judgment lien"; if the answer is no, the tax lien takes priority. Because we hold that a judgment lien is equivalent to the interest of a UCC lien creditor, we conclude that the unperfected security interest at issue here is subordinate to a judgment lien under local law.

Therefore, the federal tax lien is entitled to priority. Accordingly, we AFFIRM.

EXHIBIT B

Not Reported in F.Supp.
75 A.F.T.R.2d 95-2276, 95-1 USTC P 50,270
(Cite as: 1995 WL 381838 (M.D.Fla.))

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., a Delaware corporation, Plaintiff

v.

NATIONWIDE POWER CORPORATION, a Florida corporation, United States of America, Fitzgerald, Peters, Dakmak & Miller, P.C., Magna Card, Inc., n/k/a Highlander International Corp., a New Jersey corporation, and Brooks Satellite Corp., f/k/a Nationwide Power Corporation, a Delaware corporation, Defendants.

No. 91-377-CIV-T-21C.

United States District Court, M.D. Florida, Tampa Division.

March 30, 1995.

ORDER

NIMMONS, District Judge:

***1 This cause comes before the Court on several pending motions. United States has filed a Motion for Summary Judgment (Dkt. 73), in opposition to which Nationwide Power Corporation, Highlander International Corp., and John F. Roscow, III, as Trustee, have filed a response (Dkt. 92). The United States then filed an Unopposed Motion for Permission to File a Reply to Response to**

Motion for Summary Judgment (Dkt. 95). John F. Roscow, III, as Trustee has filed a Motion for Substitution of Party Defendant (Dkt. 86), in opposition to which the United States has filed a response (Dkt. 93). Additionally, Nationwide Power Corporation, Highlander International Corp. and John F. Roscow, III, as Trustee have filed a Verified Request for Continuance Pursuant to Rule 56(f) (Dkt. 91).

Motion for Substitution of Party Defendant

John F. Roscow, III, as Trustee asserts that he is the proper party in interest as a defendant in this interpleader action and that the Court should enter an order, pursuant to Rule 25, Fed.R.Civ.P., substituting him as party-defendant for Magna Card, Inc. n/k/a Highlander International Corp., a New Jersey corporation. He states that Magna Card, Inc. n/k/a Highlander International Corp., a New Jersey corporation, is now known as Worldwide Collections Fund, Inc., a New Jersey corporation. He states further that on February 9, 1995, Worldwide Collections Fund, Inc. transferred to John F. Roscow, III all of its "right, title, and interest in the funds in the registry of the Federal District Court for the Middle District of Florida under the case of Litton Industrial Automation Systems, Inc. v. National Power Corporation, et al., # 91-377-Civ-T-98C [sic]...." He asserts that based on this transfer, John F. Roscow, III, as Trustee, is a proper party in interest in this case.

In response, the United States argues that the Court should not allow the substitution for three reasons. First, the United States disputes that Edward J. Artes-Roy, as President and liquidating trustee of Worldwide Collections Fund, Inc., had the authority to enter into the trust

agreement. Second, the United States asserts that the so-called trust agreement is nothing more than a contingency fee agreement, and does not thereby make the representing attorney a party to the action. Third, the United States argues that the substitution would serve no useful purpose, and would only cause further, unnecessary, delay.

Pursuant to Rule 25, "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Rule 25(c), Fed.R.Civ.P. (emphasis added). The Court finds that the connection of Worldwide Collections Fund, Inc. to this proceeding has not been established, and even if such connection had been established, John F. Roscow, III, as Trustee, has not demonstrated good cause for his substitution as party-defendant in this case. He shall not, therefore, be substituted as a party-defendant in place of Magna Card, Inc. n/k/a Highlander International Corp., a New Jersey corporation.

United States' Motion for Summary Judgment

I. BACKGROUND

*2 The following facts are essentially undisputed:

1. Plaintiff Litton Industrial Automation Systems, Inc. commenced this interpleader action pursuant to 28 U.S.C. § 1335 in the United States District Court for the Eastern District of Michigan alleging that Nationwide Power Corporation had obtained a judgment against Litton on August 15, 1989, and that Litton owed Nationwide $572,627.46. [FN1]

2. On or about June 30, 1982, Nationwide entered into an agreement with A.T. Bliss and Company, Inc., pursuant to which Bliss sold Nationwide 3,000 Solar- Bliss solar water heating systems for a total sales price of $10,500,000. In return, Nationwide executed and delivered to Bliss two promissory notes totalling $7,612,500 and executed two security agreements granting Bliss a security interest in the solar systems and all proceeds therefrom. No U.C.C.-1 Financing Statement was ever filed with respect to those security agreements.

3. In December of 1982 Nationwide entered into an agreement ("master agreement") with Lamb Technicon Leasing, Inc., providing for Nationwide to sell the solar systems purchased from Bliss to Lamb Leasing and for Nationwide to lease the equipment back from Lamb Leasing.

4. The master agreement provided that Nationwide was required to procure and deliver to Lamb Leasing, the wholly owned subsidiary of Lamb Technicon, Inc., an irrevocable unconditional letter of credit in the approximate original principal amount of $4.8 million dollars. Litton, through merger, succeeded to the interests of Lamb Leasing and Lamb Technicon, Inc.

5. On or about May 15, 1985, Bliss assigned the Nationwide notes and security agreements to Magna Card, Inc., later known as Highlander International Corp. A Financing Statement was not immediately filed, but in September 1989, Highlander filed a U.C.C.-Financing Statement with the Secretary of State of Florida.

6. The Internal Revenue Service assessed penalties pursuant to Section 6700 of the Internal Revenue Code

against Nationwide on June 9, 1986, in the amount of $715,861. Nationwide has not made any payments in satisfaction of the assessed penalties, and $725,883, plus interest, remains due and owing.

7. For the year ended May 31, 1983 and the fourth quarter of 1984, the Internal Revenue Service assessed corporate income taxes, Form 940 unemployment taxes, interest and penalties against Nationwide for specified amounts. The amounts of $8,265,358.50, plus interest and statutory additions and $21,207.21, plus interest, for the years 1983 and 1984 respectively, remain due and owing.

8. A Notice of Federal Tax lien was filed with respect to Nationwide's Section 6700 penalties with the Circuit Court of Broward County, Florida on July 3, 1986, and refiled on February 20, 1987. A Notice of Federal Tax Lien was filed with respect to the fourth quarter of 1984 liability with the Circuit Court of Broward County, Florida on May 12, 1987. Notices of Federal Tax Lien were filed with respect to the liabilities for the year ended May 31, 1983 with the Circuit Court of Broward County, Florida on July 25, 1988, and filed with the Circuit Court of Polk County on August 2, 1988.

*3 9. On December 14, 1987 in the United States District Court for the Eastern District of Michigan, Nationwide filed a suit against Litton entitled Nationwide Power Corp. v. Litton Industrial Automation Systems, Inc., Case No. 87-CV-74457-DT.

10. On July, 27, 1989, the Internal Revenue Service served upon Edward C. Cutlip, attorney for Litton, a Notice of Levy in the amount of $9,513,835.85.

11. On August 4, 1989, Nationwide assigned its interest in the judgment in Case No. 87-CV-74457-DT to Highlander. The document entitled "Assignment in Lieu of Foreclosure" was executed by Phillip C. Asher as president of Nationwide and Phillip C. Asher, as president of Highlander. [FN2]

12. On August 15, 1989, the district court entered a judgment in Case No. 87-CV-74457-DT against Litton in favor of Nationwide for $561,000.69.

13. On August 18, 1989, Nationwide filed for protection under Chapter 11 of the Bankruptcy Code, in the District of Nevada. The bankruptcy court entered an Order on October 24, 1990, lifting the automatic stay "so that the pending litigation in the case of Litton Automation Systems, Inc. v. Nationwide Power Corporation, et al., No. 89-C-73369-D (USDC E.D.Mich.) may proceed." This is the instant case which was transferred to the Middle District of Florida.

14. As mentioned above, in September 1989, Highlander filed a U.C.C.-1 Financing Statement with the Secretary of State of Florida.

15. On October 19, 1989, Highlander executed an "Assignment of Judgment," which assigned to Nationwide the final judgment in Case No. 87-CV-74457-DT.

16. Nationwide filed a petition with the United States Tax Court in California, Docket No. 2166-91, disputing the deficiencies with respect to the year ended May 31, 1983. The Tax Court dismissed for lack of subject matter jurisdiction by Order entered on August 27, 1992. The

Tax Court held that the Internal Revenue Service's notice of deficiency to Nationwide's last known address was valid.

II. DISCUSSION

1. Summary Judgment Standard

The Court shall enter summary judgment only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). On the issue of materiality, "the substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are those over which disputes "might affect the outcome of the suit under the governing law." Id. at 248.

The movant bears the burden of establishing the absence of dispute over material facts. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir.1993). The moving party is entitled to summary judgment upon making an affirmative showing of a genuine issue of material fact unless the nonmoving party responds with "significant, probative evidence demonstrating the existence of a triable issue of fact." Chanel, Inc. v. Italian Activewear, Inc., 931 F.2d 1472, 1477 (11th Cir.1991). In determining whether the party seeking summary judgment has met its initial burden, the Court must view the evidence and factual inferences therefrom in the light most favorable to the opposing party. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir.1991).

2. Perfection and Priority of Security Interests

*4 Title 26 U.S.C. § 6321 directs that a tax lien shall arise "upon all property and rights to property" of a taxpayer who fails to pay taxes owed. [FN3] Pursuant to § 6322, the tax lien arises "at the time the assessment is made." Section 6323, [FN4] however, protects holders of perfected security interests and other specified persons from unfiled tax liens, or so called "secret liens' or "blind liens." [FN5] Section 6323 requires that notice of the taxing authority's lien "shall be filed" in the public records before it operates as notice effective against the specified persons: a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor. 26 U.S.C. § 6323(a), (f). As recently noted by the Eleventh Circuit, "[t]he filing requirement is critical: even a holder of a security interest who has actual knowledge of an unfiled tax lien will prevail over the government." In re Haas [94-2 USTC ¶ 50,496], 31 F.3d 1081, 1084 (11th Cir.1994) (citations omitted).

Federal law governs the priority of competing liens. Haas [94-2 USTC ¶ 50,496], 31 F.3d at 1085, Aquilino v. United States [60-2 USTC ¶ 9538], 363 U.S. 509, 513-15 (1960). The Eleventh Circuit has stated that "two basic principles govern the adjudication of priority of competing liens: (i) 'the first in time is first in right'; and (ii) a federal tax lien is superior to a nonfederal lien that is inchoate." Haas [94-2 USTC ¶ 50,496], 31 F.3d at 1085 (citations omitted).

The United States argues that its federal tax liens are superior to any claim of Highlander. The United States asserts that Highlander does not have priority over the federal tax lien based on 26 U.S.C. § 6323(a). The United States asserts that because Highlander does not purport to be a purchaser, mechanic's lienor, or judgment lien

creditor, § 6323(a) does not protect Highlander. Further, the United States asserts that because Highlander did not perfect its interest as an assignee in the security agreement between Bliss and Nationwide by recording with the Secretary of State of Florida, Highlander is not protected against a subsequent lien creditor as provided for under 26 U.S.C. § 6323(a) and (h)(1). See Sun Bank, N.A. v. Parkland Design & Development Corp., 466 So.2d 1089, 1093 (Fla. 5th DCA 1985), citing § 679.301(3), Fla.Stat. (1983) (finding that under Article 9's priority rules, an unperfected assignee of an account is subordinate to a lien creditor that has acquired a lien by attachment, levy, or the like). The United States maintains, therefore, that the federal tax liens in this case attached to Nationwide's interest in the judgment against Litton and are superior to any claims or interest of Highlander.

Further, the United States states that although the validity of the notice and demand prior to the filing of the federal tax liens and the validity of the levy are not dispositive issues, the United States properly performed those actions. First, the United States argues that the Certificates of Assessments and Payments are sufficient proof of proper notice and demand. The United States asserts that the Certificates of Assessments and Payments attached as Exhibits D, E, and F to the Statement of Material Facts establish prima facie evidence that the Internal Revenue Service gave proper notice and demand for payment to Nationwide. The United States states that the fact that the IRS does not retain the actual notice and demand letters is not relevant because the copies are not maintained by the IRS but are recorded and programmed in the IRS' computers. The United States therefore asserts that the Certificates of Assessments and Payments are sufficient evidence to establish that the IRS gave proper notice and demand to the taxpayer prior to

the execution of the levy. The United States further asserts that notice and demand were made on the same day as assessment and, therefore, upon the case authority of Capuano v. United States [92-1 USTC ¶ 50,163], 955 F.2d 1427, 1432 (11th Cir.1992), the Court should find that the federal tax liens attached to all of Nationwide's property, including Nationwide's right, title, and interest in its judgment against Litton upon assessment. Second, the United States states that the levy was proper because Litton's agent, was acting as Litton's agent, and because Nationwide was in fact provided with a copy of the levy.

*5 In response, the Parties-Defendant argue that, at best, the United States has only a "blind lien' under §§ 6321 and 6322 arising upon the tax assessment. Further, Roscow (Highlander) claims an interest in the interpleaded funds as both a "purchaser" and as a "holder of a security interest," and he asserts that, as such, Highlander is entitled to priority under § 6323(a) over the unperfected federal tax lien. Further, the Parties-Defendant seek to preserve any claim by Nationwide that the notice and demand required to be sent under § 6321 was never sent. Moreover, to the extent that the United States asserts that its levy effectively perfected its claim, the Parties-Defendant attack both the existence of a notice of levy and the propriety of the levy upon Mr. Cutlip, Litton's attorney. Finally, they assert that the United States' argument that Highlander's security agreement has not been properly perfected should fail because either: (1) a material issue of fact exists as to whether the bankruptcy court annulled the automatic stay upon dismissing Nationwide's bankruptcy case, or (2) the argument is foreclosed by this Court's decision in Major Electrical Supplies, Inc. v. J.W. Pettit Co. [77-1 USTC ¶ 9280], 427 F.Supp. 752 (M.D.Fla.1977).

The Parties-Defendant first claim that their interest has priority by asserting that Highlander achieved "purchaser" status via an assignment from Nationwide of Nationwide's interest in and to $550,000.00 of the interpleaded funds by a document entitled "Agreement" dated January 30, 1992. (Dkt. 90, Exh. C-2). Roscow then asserts that his claim as "purchaser" and the consideration to support it is set forth in the trust agreement filed herein. (Dkt. 86, Exh. A). The Court, however, has already determined that Roscow shall not be substituted as a party in this case, and finds, moreover, that neither the assignment of the $550,000.00 nor the trust agreement is sufficient for Highlander or Roscow to establish purchaser status pursuant to 26 U.S.C. § 6323(h)(6). [FN6] As discussed infra, neither Highlander nor Roscow has established that their interest in the interpleaded funds is valid under local law against subsequent purchasers without actual notice. They therefore did not achieve status as a purchaser.

Next, the Parties-Defendant claim that their interest has priority by asserting that Highlander and thus Roscow are entitled to status as a "holder of a security interest" in accordance with § 6323(h)(1). [FN7] They rely upon the existence of two documents as evidence that each have a "security interest" under § 6323(h)(1). Those documents are: (1) the Collateral Assignment (Dkt. 90, Exh. D) whereby Energy Leasing Corporation, previously known as Nationwide, granted to Magna Card a security interest in, and collaterally assigned, the cash collateral; and (2) the Worldwide Trust (Dkt. 90, Exh. C-1), whereby Worldwide, on February 9, 1995 purported to grant Roscow its interest in the instant case. They further assert that perfection occurred in 1989 due to the

filings of three U.C.C.-1 Financing Statements. As discussed infra, however, the Court finds that Highlander (and thus Roscow) did not establish an interest protected under local law against a subsequent judgment lien arising out of an unsecured obligation. They, therefore, did not achieve status as a holder of a security interest.

*6 In order for Highlander to have acquired an interest in the interpleaded funds valid under Florida law against subsequent purchasers without actual notice or against a subsequent judgment lien arising out of an unsecured obligation, Highlander must have filed a U.C.C.-1 Financing Statement. Section 679.302(1), Florida Statutes, provides that a financing statement must be filed to perfect all security interests except the listed exceptions. Further, pursuant to § 679.301(1), Florida Statutes, an unperfected security interest is subordinate to the rights of "a lien creditor before the security interest is perfected." A "lien creditor," is "a creditor who has acquired a lien on the property involved by attachment, levy, or the like...." § 679.301(3), Florida Statutes; see SunBank, 466 So.2d at 1093 ("A garnishing judgment creditor qualifies as a lien creditor under Section 679.301, upon service of process on the account debtor.").

The Parties-Defendant have not argued, and this Court does not find, that their interest in the interpleaded funds, which they assert has priority over the federal tax liens, is within the exceptions to security interests that must be filed to be perfected. [FN8] Rather, the Parties-Defendant argue that their interest was perfected by the filing of three U.C.C.-1 Financing Statements filed in August and September 1989. (Dkt. 90, Exh. E-1, E-2, E-3). They further assert that a genuine issue of material fact precludes a finding on the position asserted by the

United States: that said filings were void as an act to create a lien due to Nationwide's prior bankruptcy filing and the automatic stay. They assert that the bankruptcy court may have annulled, rather than terminated, the automatic stay upon dismissing the bankruptcy case. It is a well established rule that "[a]ctions taken in violation of the automatic stay are void and without effect." Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir.1982) (citations omitted). However, the Parties-Defendant assert that if the automatic stay was annulled, the U.C.C.-1 Financing Statements granting a security interest are not void. The Court finds, however, that this assertion by the Parties-Defendant does not satisfy their burden on this Motion for Summary Judgment because they have not set forth "significant, probative evidence demonstrating the existence of a triable issue of fact." Chanel, 931 F.2d at 1477. Although Defendant Nationwide herein is the same Defendant in the bankruptcy case, it has failed to provide a copy of the bankruptcy court order or other evidence that upon dismissal, the bankruptcy court annulled, rather than terminated, the automatic stay. The Court, therefore, finds that Highlander did not perfect its security interest and, accordingly, did not acquire an interest in the interpleaded funds sufficient under Florida law against subsequent purchasers without actual notice or against a subsequent judgment lien arising out of an unsecured obligation.

*7 Nevertheless, the Court finds that even if the bankruptcy court had annulled the automatic stay such that Highlander's filing of the U.C.C.-1 Financing Statements perfected its security interest in the interpleaded funds, said security interest would not be entitled to priority over the federal tax liens under federal law due to the dates on which Highlander filed its U.C.C.-1 Financing

Statements. In determining the priority of competing liens under federal law, "[a] properly filed federal tax lien will prevail over a prior lien which is unperfected in the federal sense, i.e., as the perfection process is defined in § 6323(h)(1) ('has become protected under local law against a subsequent judgment creditor')." Haas [94-2 USTC ¶ 50,496], 31 F.3d at 1087. In interpreting the phrase "protected under local law against a subsequent judgment lien," the Eleventh Circuit has noted that courts and commentators equate the phrase to being protected against a "lien creditor" as defined in U.C.C. § 9-301(3). Id. at 1087. In Haas, the Eleventh Circuit further determined that the "hypothetical judgment lien creditor test" is the appropriate test for determining priority of security interests. Id. "The pertinent inquiry is whether the security interest is protected under local law against any hypothetical judgment lien creditor that might arise, regardless of whether the Government has knowledge of the competing nonfederal interest." Id.

Moreover, in Haas, the Eleventh Circuit noted that "[i]n enacting the priority scheme of the Federal Tax Lien Act, Congress intended to select a fair and appropriate position in the spectrum of priorities for the IRS. Congress selected the time the IRS filed its federal tax lien." Id. The Court concluded that "the hypothetical judgment lien creditor test operates to put the IRS in the shoes of any subsequent judgment creditor, including the most favorable shoes." Id. at 1089. Thus, if any subsequent judgment creditor could prevail over the Parties-Defendant at the time the United States filed the federal tax liens, then the United States prevails.

In the instant case, the federal tax liens were filed on July 3, 1986, May 12, 1987, July 25, 1988 and August 2, 1988.

Highlander's U.C.C.-1 Financing Statement, however, was not filed in Florida until September 1989. Therefore, assuming that all the federal tax liens and security interests in this case were properly filed and perfected, Highlander's interest was clearly not perfected before the date that the federal tax liens were filed. Accordingly, the Court finds that application of the hypothetical judgment lien creditor test in this case gives the IRS priority over Highlander's subsequently perfected security interest because a class of judgment creditors without notice could have prevailed over Highlander's interest.

Moreover, even if the Court were persuaded that the security interest of the Parties-Defendant was properly perfected by the filing of the U.C.C.-1 Financing Statements, the Parties-Defendant would have to show that the federal tax liens were not properly perfected in order to establish priority over them. The Parties-Defendant have alleged that there is a genuine issue of material fact as to whether the United States sent the notice and demand required by § 6321 and they assert that the United States failed to file its tax liens in the correct county, thereby rendering the tax liens unperfected. [FN9]

*8 Although, as indicated in the Court's analysis above, the Parties- Defendant fail to raise a genuine issue of material fact, the Court nevertheless finds that the federal tax liens were, in fact, properly perfected. First, the United States gave proper notices and demands to Nationwide. Pursuant to 26 U.S.C. § 6303(a), as soon as practicable and within sixty days after making an assessment, the IRS must issue a "notice and demand" letter to the taxpayer, specifying the amount due and demanding payment. If the taxpayer does not pay after demand, the IRS may file a lien against his or her property. 26 U.S.C.

§ 6321. Certificates of Assessments and Payments are presumptive proof that the IRS made proper notice and demand. United States v. Chila [89-1 USTC ¶ 9299], 871 F.2d 1015, 1018 (11th Cir.1989), cert. denied, 493 U.S. 975 (1989). The Certificates of Assessments and Payments filed by the United States in the instant case (Dkt. 75, Exh. D, E, F) indicate that the IRS gave notice of: (1) the $725,888 assessment on June 9, 1986 and September 29, 1986, (2) the $21,207.21 assessment on April 1, 1985 and March 9, 1987, and (3) the $8,265,358.50 assessment on May 24, 1988. [FN10] Further, the Parties-Defendant have failed to present any evidence tending to rebut the presumption that notices and demands were properly sent.

Second, the Court rejects the argument of the Parties-Defendant that the United States failed to file the tax liens in the correct county. The Parties- Defendant indicate that Nationwide's Response to the United States' First Set of Interrogatories states that from June 1986 to November 1986, the principal place of business and location of the corporate office was in Orangewood, California, and that at no time subsequent to the filing of the first July 3, 1986 tax lien in Broward County was Nationwide's office ever located in Broward County, Florida. They assert, therefore, that the Broward County tax liens are not perfected. Further, the Parties-Defendant indicate that Nationwide's Response states that Nationwide's offices were located in Polk County between November 1986 and June 1987, but that the July 25, 1988 tax lien was not recorded until July 29, 1988 in Polk County, over one year after the company's offices had been relocated to Boca Raton in Palm Beach County.

The Court finds, however, that the United States did properly file its notice of federal tax liens in Broward County. [FN11] In its Articles of Incorporation, Nationwide lists its address as Pompano Beach, Florida, in the county of Broward. Article I of the Bylaws also indicates that the principal office is in the city of Pompano Beach, County of Broward. Additionally, in 1985, Nationwide changed its name to Energy Leasing Corporation and filed a certificate with the Secretary of State designating its principal place of business in the City of Fort Lauderdale (in Broward County). Nationwide has not produced any evidence to support its interrogatory statements. The Court finds, therefore, that the Parties-Defendant have not raised a genuine issue of material fact precluding summary judgment on the issue of filing in the correct county.

***9 Finally, the Court finds that the assertion by the Parties-Defendant that the federal tax lien never attached to the interpleaded funds based on Major Electrical Supplies, Inc. v. J.W. Pettit Co. [77-1 USTC ¶ 9280], 427 F.Supp. 752 (M.D.Fla.1977) is unfounded. In Major, the Court stated:**

> **[A] judgment lien does not attach to an intangible interest such as the right to receive the payment of a debt ... "Insofar as what we call a 'simple judgment creditor' is concerned, there is simply no such thing as a judgment lien against an account receivable in this state. The only way a simple judgment creditor can reach an account receivable owed to his debtors is by way of a separate and independent judicial proceeding to collect for himself the amount due thereon--either by way of garnishment proceedings or, in a proper case,**

by a suit brought in his own name by the assignee thereof."

Id. at 755, quoting Peninsula State Bank v. United States [68-1 USTC ¶ 9433], 211 So.2d 3, 5 (1968). This principle that a judgment lien does not attach to an intangible interest does not stand for the principle that a federal tax lien does not attach to an intangible interest such as the chose in action that Nationwide had against Litton. Rather, the Major court's analysis is dealing with the application of 26 U.S.C. § 6323(h)(1), which as Major points out, provides that "a prior security interest is protected against a later recorded tax lien when, at the time of the recording of the tax lien, the property subject to the prior interest therein '... has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation.' " [77-1 USTC ¶ 9280] 427 F.Supp. at 755.

Under this analysis, it is incumbent upon the holder of a prior security interest when asserting priority over a later recorded tax lien to establish that its prior interest would be protected against a hypothetical judgment lien. None of this analysis, however, detracts from the viability of a federal tax lien. The federal tax liens in the instant case attached to a chose in action, Nationwide's interest in its claim against Litton, and the federal tax liens subsequently attached to the judgment in that lawsuit. See Phillip & Jacobs, Inc. v. Color-Art, Inc. [82-2 USTC ¶ 9489], 553 F.Supp. 14, 16 (N.D.Ga.1982), citing United States v. Citizens and Southern Nat'l Bank [76- 2 USTC ¶ 9665], 538 F.2d 1101, 1105 (5th Cir.1976, cert. denied, 430 U.S. 945 (1977); United States v. Hubbell [63-2 USTC ¶ 9724], 323 F.2d 197, 200 (5th Cir.1963); Internal Revenue Code of 1954, Section 6321 ("A chose in action is property to which a federal tax lien will attach."). See

also Moyer v. Mathas [71-2 USTC ¶ 9533], 332 F.Supp. 357, 359 (M.D.Fla.1971) (finding that the federal tax liens attached to the surplus fluids deposited with the Clerk of Circuit Court following a tax sale of property, which the taxpayer owned on and after assessment and which the taxpayer conveyed to the plaintiff who claimed an entitlement to the surplus funds).

***10 In sum, the Parties-Defendant have failed to raise any genuine issue of material fact that would preclude summary judgment and the Court finds that the United States has demonstrated entitlement to judgment as a matter of law.**

Upon consideration of the foregoing, it is hereby ORDERED and ADJUDGED that:

(1) John F. Roscow, III, as Trustee's Motion for Substitution of Party Defendant (Dkt. 86) is DENIED.

(2) Nationwide Power Corporation, Highlander International Corp. and John F. Roscow, III, as Trustee's Verified Request for Continuance Pursuant to Rule 56(f) (Dkt. 91) is DENIED.

(3) The United States' Motion for Summary Judgment (Dkt. 73) is GRANTED.

DONE AND ORDERED.

FN1. Litton deposited $572,627.46 into the registry of the Court. Litton has been dismissed from this case as a disinterested stakeholder pursuant to the Court's January 17, 1995 Order (Dkt. 84).

FN2. This Assignment recited that Assignor Nationwide had executed the 1982 security agreements granting a first security interest to Bliss in the subject solar systems and all proceeds and collateral derived therefrom; that in 1985 Bliss had assigned all of its rights, title and interest in the notes and security agreements to Magna Card, n/k/a Highlander; that certain cash proceeds from the collateral and collateralized by the Security Agreements are the subject matter of the above referred lawsuit then pending in Michigan, Case No. 87-CV-74457-DT; that Assignor Nationwide is in default of the Notes and the Security Agreement; and that Assignor Nationwide and Assignee Highlander wish to enter this Assignment for the purpose of satisfying the Notes and the Security Agreements. The Assignment then purported to assign to Highlander "all of [Nationwide's] right, title and interest in and to that certain chose in action and any judgment obtaining therefrom in [the currently pending Case No. 87-CIV- 74457-DT]."

FN3. Title 26 U.S.C. § 6321 provides:
If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

FN4. Title 26 U.S.C. § 6323(a) provides that '[t]he lien imposed by section 6321 shall not be

valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary."

FN5. The Parties-Defendant refer to the tax lien arising pursuant to §§ 6321 and 6322 as a "blind lien." (Note: Because this is an interpleader action all of the competing parties are Defendants. For purposes of this Order, Defendant United States of America will be referred to as the "United States." The remaining Defendants will be referred to either by their individual names or collectively as "Parties-Defendant.")

FN6. Title 26 U.S.C. § 6323(h)(6) provides:

The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324--

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property, which is not a lien or security interest shall be treated as an interest in property.

(emphasis added).

FN7. Title 26 U.S.C. § 6323(h)(1) provides:
The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.
(emphasis added).

FN8. The Florida Fifth District Court of Appeal has noted that "courts uniformly require the assignee in whose favor the exception operates to prove the basic facts sufficient to excuse him from filing. If the record is silent on these matters, the issue is resolved against the assignee." Sun Bank, N.A. v. Parkland Design and Development Corp., 466 So.2d 1089, 1093 (discussing the applicability of the exception under § 679.302(1)(e), Florida Statutes).

FN9. The Parties-Defendant also challenge the United States' reliance upon the levy to perfect its interest. Because the Court finds that the federal tax liens were properly filed, however, it need not address that issue.

FN10. The Court notes that each of the notices and demands were sent prior to the filing of the federal tax lien for the respective assessment.

FN11. The United States filed federal tax liens in Broward County on July 3, 1986, February 20, 1987, May 12, 1987, and July 25, 1988. It filed one federal tax lien in Polk County on August 2, 1988.

END OF DOCUMENT

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-2725

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.,

Plaintiff,

versus

NATIONWIDE POWER CORPORATION; FITZGERALD PETERS, DAKMAK & MILLER, P.C.,

Defendants-Cross-Defendants,

UNITED STATES OF AMERICA,

Defendant-Cross-Defendant-Appellee,

MAGNA CARD, INC., d.b.a. Highlander International Corporation; JOHN F. ROSCOW, III,

Defendant-Cross-Defendant-Appellant,

BROOKS SATELLITE,
f.k.a. Nationwide Power Corporation,

Defendant-Cross-Defendant.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S)OF REHARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: BIRCH, Circuit Judge, KRAVITCH*, Senior Circuit Judge, and SCHWARZER, Senior District Judge**

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

(6/95)

***Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.**

****Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.**

EXHIBIT D

Reg. Sec. 301.6323(h)-1(g); Judgment lien creditor.

The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.